APPEAL NO. 93332

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held on February 25, 1993, in (city), Texas before hearing officer (hearing officer). The sole issue was whether or not the claimant on (date of injury) was an employee of Llano Cemetery Association or an independent contractor; a second issue, whether or not the carrier must pay temporary income benefits for the period of time from its notice of claim and date of controversion, was withdrawn upon agreement of the parties.

The appellant, who is the claimant herein, basically appeals the hearing officer's determination that she was an independent contractor and not an employee of the cemetery association on the date of her injury. The respondent, hereinafter carrier, essentially contends the hearing officer's decision is supported by the evidence and by applicable law.

DECISION

We affirm the decision and order of the hearing officer.

The claimant testified that she began working for the (employer) as a pre-need sales counselor around the first of August 1990. On (date of injury), when coming down the stairs at employer's place of business, she tripped and fell, injuring her back.

On May 21, 1992, the claimant and the employer had entered into a "Surveying Agent Contract" which purported to spell out the relationship between the two parties. (The claimant testified at the hearing that this was the first contract she signed with employer, and that she was required to sign it in order to keep her job. (Mr. L), employer's general manager who also signed the contract, testified that all sales counselors signed the identical contract upon their association with employer; that claimant had originally signed the same contract in 1990, but that the employer had sales counselors re-execute the contract after the original contracts were lost or misplaced.) This contract provided in pertinent part as follows:

RELATIONSHIP 3. The relationship between the [employer] and [claimant] shall be that of independent contractor and contractee, and not that of employer and employee, and the work, contacts and solicitations of [claimant] shall be under the sole supervision, management, direction and control of [claimant]. Other than when there is an impending death, [claimant] shall be free to exercise independent judgment as to the persons from whom pre-need purchase contracts are solicited, as to the time and place of solicitation and as to the methods by which the desired results are obtained but the [employer] may from time to time prescribe Standard Procedures with respect to the conduct of the business covered hereby, not interfering with such freedom of action of [claimant], which Standard Procedure [claimant] will conform to and observe. The [employer] shall look to [claimant] for results only, and shall not

have the right at any time to direct or supervise the [claimant] in the performance of such activities and work or as to the means and method in which the same are performed. It is agreed that if any training, materials, surveying aids or similar services are furnished to [claimant] by the [employer], it is for the purpose of assisting the business of the [claimant] and not to control [claimant]. . . .

TERMINATION 11. This contract will terminate upon the death of [claimant] or upon notice of termination in writing by one party to the other. . . If the [claimant] does not comply with the policies and procrdures (sic) of the [employer], this Contract may be terminated without written notice or advance notice.

Both claimant and Mr. L agreed that claimant was paid solely on commission; that she was responsible for her own taxes; and that employer furnished her and other counselors with office space, a telephone, and office supplies and materials, although she could also have worked out of her home or from another location. She stated that she used her own vehicle for going to appointments, and employer did not reimburse her for mileage. Claimant testified that she was required by the employer to be in the office one "duty day" a week, and that she was required to sign in and out. Mr. L testified that claimant had no required hours; that "duty day" was a privilege extended to counselors, and was not a requirement but rather allowed counselors the opportunity to take all incoming calls on that day and thereby develop leads. He said the sign-in sheet also was not mandatory, but rather was a convenience to the counselors so that clients would be able to reach them.

When asked about employer's "standard procedures" as described in paragraph eleven of the contract, Mr. L said there were no written procedures for the sales counselors (versus for employees of employer). He said, however, that a counselor's relationship with employer could be terminated for giving false or misleading information about employer or for projecting a bad image, although he said no one had been terminated under the contract. The claimant said the employer could take action against her, for example, for not showing up for appointments, or for not signing in.

Both claimant and Mr. L said the employer's sales coordinator trained new counselors with regard to information about the employer's business and how to sell cemetery property. Sales presentation materials ("sales kits") also were provided, but claimant and Mr. L both said the counselors were able to tailor their own presentations according to what they thought was most effective. Mr. L stated his belief that certain kinds of skills--such as the ability to be a caring person--could not be instilled by training.

Four days after claimant's injury, on October 13, 1992, she got into a disagreement with a coworker at employer's office and was asked to leave for the day by Mr. L. She did not return to work after that day. Mr. L testified at the hearing that this was the second such

occurrence, and that he had warned claimant the first time that if it happened again she would be sent home for the rest of the day. Mr. L said the verbal disagreement, which was loud and involved foul language, occurred within earshot of an at-need client family. However, he said when he sent claimant home that day he was not aware she was quitting.

In her appeal, claimant challenges the following findings of fact and conclusions of law made by the hearing officer:

FINDINGS OF FACT

5.The [employer] had no right to control the details of claimant's work as a sales counselor for the [employer].

6.The only restriction or control by the [employer] on claimant was that claimant be truthful, above-board and caring in her relationships with their prospective clients.

7.Claimant was not paid a salary, but worked on a straight sales-commission basis and the [employer] did not withhold social security or income taxes from her checks.

8.Claimant could determine her own working hours and could come and go as she pleased, so long as she kept her appointments with prospective clients once those appointments were made.

10.In practice, the [employer] did not control the details of claimant's work, but did supply her with information about its business and an industry standard sales kit for sales presentations, which she could alter, use or not use at her discretion.

11.The main prerequisite for claimant's job was a caring attitude and a genuine affection for people, which claimant had before she began work with the [employer].

CONCLUSIONS OF LAW

2.Claimant was an independent contractor and not an employee of [employer] on the date she was injured.

3.Carrier is not liable on this claim.

The claimant also complains of the lack of a finding of fact on the issue of who supplied the necessary tools, supplies, and materials to perform the job, and contends that many of the hearing officer's findings do not meet the tests contained in Article 8308-3.05(a).

The carrier argues in response that that statute lists some of the factors which are evidence of an employer's right to control another, but that the factors listed are inclusive and not conclusive. The carrier also contends that sufficient evidence supports the hearing officer's findings on who had the right to control and the conclusion that claimant was an independent contractor.

The 1989 Act, Article 8308-1.03(18), provides that the term "employee" for purposes of workers' compensation insurance coverage does not include an independent contractor. "Independent contractor" is defined as a person who contracts to perform work or provide a service for the benefit of another and who ordinarily:

A. acts as the employer or any employee of the contractor by paying wages, directing activities, and performing other similar functions characteristic of an employer-employee relationship;

B. is free to determine the manner in which the work or service is performed, including the hours of labor of or method of payment to any employee;

C. is required to furnish or have his employees, if any, furnish tools, supplies, or materials to perform the work or service; and

D. possess the skills required for the specific work or service.

Article 8308-3.05(a)

While the statute embodies several common law factors which courts in the past have looked to in determining whether one party has the right to control the details of another's work, this panel has held that the statute incorporates some, but not all, of the elements in case law which define independent contractor status, and that it does not appear that each and every evidentiary factor contained in the statute must be present for a determination that a worker is an independent contractor. Texas Workers' Compensation Commission Appeal No. 91115, decided January 29, 1992; Texas Workers' Compensation Commission Appeal No. 93110, decided March 26, 1993.

The key test, under common law, with regard to independent contractor status, is whether the purported employer had the right of control over the work. Continental Insurance Company v. Wolford, 526 S.W.2d 539 (Tex. 1975). The relationship between the parties can be set forth in a contract, so long as the contract expressly determines the issue of right of control. Archem Company v. Austin Industrial, Inc., 804 S.W.2d 268 (Civ. App.-Houston [1st Dist.] 1991, no writ); Sanchez v. Leggett, 489 S.W.2d 383 (Tex. Civ. App.-Corpus Christi 1972, writ ref'd n.r.e.). In the latter two cases, the courts held that the contracts in question did not contain what the Sanchez court called the "magic" provision that determined the question. However, the requisite express provision was found to exist

in the case of Magnolia Petroleum Co. v. Francis, 169 S.W.2d 286 (Tex. Civ. App.-Beaumont 1943, writ ref'd), in which the contractor agreed to furnish labor, equipment, and all things necessary to perform the work and services listed therein as "an independent contractor, free of control or supervision of company as to means and method of performing the same. . . ." *Id.* at 286.

Upon our review of the evidence, we believe the contract in this case was sufficiently specific in detailing the right of control as to be conclusive as to the nature of the parties' relationship. Swift v. Aetna Casualty & Surety Company, 449 S.W.2d 818 (Tex. Civ. App.-Houston [14th Dist.] 1970, no writ). We thus find supportable the hearing officer's determination that the employer had no right to control the details of claimant's work as a sales counselor. Neither the fact that the employer supplied the claimant with initial training and sales materials, nor that paragraph eleven of the contract speaks of the employer prescribing "standard procedure" changes this result. To the extent that the testimony of Mr. L explained the provisions of the contract and the underlying relationship between the parties, sales counselors such as claimant clearly had broad latitude in the manner and means by which they performed their jobs, subject to only such general control as to make sure the work was properly and expeditiously done, which does not create an employer-employee relationship. Texas Employers Insurance Association v. Bewley, 560 S.W.2d 147 (Tex. Civ. App.-Houston [1st Dist.] 1977, no writ). Neither was it error for the hearing officer to make no specific finding on whether the claimant was required to furnish the necessary tools, supplies, or materials to perform her job for employer since, as we noted above, the list of elements in Article 8308-3.05(a) is not exhaustive, and ordinarily no one feature of the relationship between the worker and the employer is determinative. Keith v. Blanscett, 450 S.W.2d 124 (Tex. Civ. App.-El Paso 1969, no writ).

Based upon our review of the record and applicable statutes and case law, we affirm the decision and order of the hearing officer.

Lynda H. Nesenholtz
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Joe Sebesta
Appeals Judge